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ALEXANDER L. STEVAS,
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Case No. 83-5977

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR MASON, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE FLORIDA SUPREME COURT

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OPINION BELOW

The opinion of the Florida Supreme Court sought to be reviewed is reported as Mason v. State, 438 So.2d 374 (Fla. 1983).

STATEMENT OF THE CASE AND FACTS

Petitioner, Oscar Mason, Jr., was indicted for first-degree murder. After jury trial, he was convicted and a penalty trial was held. The jury recommended death, and the trial court entered an order imposing death. The following aggravating circumstances were found:

1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

2. The defendant knowingly created a great risk of death to many persons.

3. The capital felony was committed while the defendant was engaged in a burglary.

4. The capital felony was especially heinous, atrocious or cruel.

5. The capital felony was committed in a cold, calculated and premeditated manner.

The court did not find any mitigating circumstances.

On appeal to the Florida Supreme Court the judgment and sentence were affirmed; however, the aggravating factor of great risk of harm to many was stricken. Rehearing was denied and the petition to this court followed.

The following facts were taken from the Florida Supreme Court opinion.

In the early morning hours of March 19, 1980, eleven-year-old Missy Chapman woke her two brothers, telling them that something was the matter with their mother, Linda Sue Chapman, who lay in bed making choking sounds. Mrs. Chapman, who had been stabbed, died before the police or an ambulance arrived. None of the children reported having seen or heard anyone in their home the night of the killing.

A few days after the killing, Missy contacted a detective working on the case and told him that she had seen her mother being stabbed and had acted asleep until the man left the house. Fear that the killer would return had kept her from disclosing what she saw, claimed Missy. She described the assailant as a skinny black male, seventeen to nineteen years old, with short, dark hair. At a later deposition, however, Missy stated that she could not "actually see what [the killer] looked like." She was also unable, at a line-up or from photographs, to identify Appellant or anyone else as the killer. At trial, nevertheless, Missy pointed out appellant, stating that she was "sure" he was her mother's murderer.

Two of Appellant's fingerprints were found on the siding of the Chapman home, but none were found inside. A state's witness also testified that in his opinion, hairs found at the scene were Appellant's.

At trial, the judge held admissible evidence concerning Appellant's conviction for a rape and robbery committed two days after the Chapman murder. The collateral crime evidence was found relevant to the issue of identity on the basis of the similarity of the modus operandi used in each instance.

ARGUMENT

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

Respondent respectfully submits this Court should not review by certiorari the Florida Supreme Court's opinion in Mason v. State, supra, because the purported constitutional issue presented in the petition was never presented to the State courts. See Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969). Petitioner raised the following issue in the state court:

"THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS 'COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION,' SINCE THE EVIDENCE WAS INSUFFICIENT THEREOF AND IT IS MERELY A 'DOUBLE-UP' OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE."

The argument that followed in no way challenged this aggravating circumstance on constitutional grounds. There was merely an argument as to why the particular facts of the case did not bring it within the aggravating circumstance.

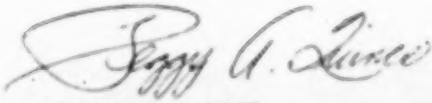
In Cardinale v. Louisiana, supra. the Petitioner had been convicted of murder and sentenced to death. At his trial, his confession had been introduced in its entirety. His argument before this Court alleged parts of the confession were irrelevant and prejudicial, and he contended the Louisiana statute requiring confessions be admitted in their entirety was unconstitutional. Certiorari was granted, but it was learned in oral argument that the constitutional issue had never been presented to the state court. Therefore, this Court, after citing a number of earlier cases which indicated jurisdiction fails unless the federal question was raised and decided in the state court, dismissed the writ for want of jurisdiction. There is no jurisdiction in this case since Mason never presented his federal question to the state court.

CONCLUSION

Based on the foregoing argument the Petition for Writ of Certiorari should be dismissed for lack of jurisdiction.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William C. McLain, Assistant Public Defender, 455 North Broadway Avenue, Bartow, Florida, 33830, this 17th day of January, 1984.

Peggy A. Quince
Of Counsel for Respondent